

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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United States Court of Appeals for the District of Columbia

JANUARY TERM, 1936

No. 662 **829**

U. S. FIDELITY & GUARANTY CO., A BODY
CORPORATE, PLAINTIFF IN ERROR,

vs.

PENNSYLVANIA DRUG COMPANY, INC., A BODY
CORPORATE.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF
COLUMBIA.

FILED JANUARY 16, 1936.

PRINTED FEBRUARY 19, 1936.

United States Court of Appeals for the District of Columbia

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No. 6627

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CORPORATE, PLAINTIFF IN ERROR,

vs.

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CORPORATE, DEFENDANT IN ERROR.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF
COLUMBIA.

INDEX.

	Original	Print
Caption	1	1
Bill of particulars	2	1
The finding of fact of October 10, 1935.....	3	3
The judgment of October 17, 1935.....	3	3
Writ of error	4	3
Bill of exceptions	5	4
Testimony of Mr. David Portner.....	5	5
Detective Sergeant Murray.....	7	6
Gerald I. Oxenburgh	8	7
Mr. William F. Blaydes, Jr.	9	8
Assignment of errors	11	9
Designation of record	11	9
Clerk's certificate	13	10

United States Court of Appeals for the District of Columbia

No. 6627.

U. S. FIDELITY & GUARANTY Co., a Body Corporate, Plaintiff
in Error,

vs.

PENNSYLVANIA DRUG COMPANY, INC., a Body Corporate.

1 Municipal Court of the District of Columbia.

No. 312,665.

PENNSYLVANIA DRUG Co., INC., a Body Corporate, Plaintiff,

vs.

U. S. FIDELITY & GUARANTY Co., a Body Corporate,
Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Municipal Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

2 *Bill of Particulars.*

Filed August 13, 1935.

The plaintiff, a body corporate, existing under and by virtue of the laws of the State of Maryland, by and through its attorneys, Blanken & Blanken, sues the defendant, a body corporate having offices and doing business in the District of Columbia, for that heretofore on, to wit, the 1st day

of March, 1934, the said plaintiff entered into a certain contract of insurance with the defendant under the terms of which the said defendant, among other things, agreed for a valuable consideration which was duly paid unto it, to indemnify the plaintiff for loss occasioned by safe burglary, not to exceed the sum of two hundred and fifty (\$250) dollars; that said portion of said insurance contract reads as follows:

* * * IV. To Indemnify the assured for loss not exceeding two hundred fifty dollars (\$250) of such property occasioned by safe burglary which shall mean the felonious abstraction of such property from within a safe or vault in such premises or while located elsewhere after removal therefrom by burglars, by any person or persons making felonious entry into the safe and also into the vault, if any, containing the safe, when all doors of the safe and vault are duly closed, and locked by at least one combination or time lock thereon; provided that such entry shall be made by actual force and violence of which where shall be visible marks made by tools, explosives, electricity, gas or other chemicals, upon the exterior of (a) all of said doors of the safe and of the vault, if any, containing the safe, if entry is made through such doors, or (b) the top, bottom or walls of the safe and of the vault, through which entry is made, if not made through such doors: * * *.

That thereafter on, to wit, the 12th day of July, 1934, the plaintiff sustained a loss of, to wit, the sum of two hundred and sixty-four dollars and twenty-three cents (\$264.23) by reason of its safe being burglarized, and in due course demand was made upon the defendant that it indemnify the plaintiff in accordance with the contract of insurance hereinabove referred to but this the defendant failed and refused to do and still refuses to do.

Wherefore, plaintiff brings this suit and asks that it be given judgment against said defendant in the sum of two hundred and fifty (\$250) dollars with interest from July 12, 1934, besides costs.

(Signed) BLANKEN & BLANKEN,
Earle Building,
Attorneys for Plaintiff.

The Finding of Fact of October 10, 1935.

Mins. 92, p. 238.

Come now the parties hereto and thereupon this cause being heard and submitted the Court finds in favor of the plaintiff in the sum of two hundred fifty dollars (\$250.00), — interest from July 12, 1934.

The Judgment of October 17, 1935.

Mins. 92, p. 256.

Come now the parties hereto, by their attorneys of record, and the motion for a new trial being heard and considered, it is ordered that said motion be and the same is hereby overruled.

Wherefore, it is considered that plaintiff recover of defendant in the sum of two hundred fifty Dollars (\$250.00) — interest from July 12, 1934, and have execution thereof. (Defendant notes exception.)

4 [Stamp:] Filed Oct. 28, 1935, Municipal Court, District of Columbia.

UNITED STATES OF AMERICA, ss:

The President of the United States, to the Honorable Ellen K. Raedy, Judge of the Municipal Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Municipal Court, before you, between Pennsylvania Drug Co., Inc., a Body Corporate, Plaintiff, and U. S. Fidelity & Guaranty Co., a Body Corporate, Defendant, No. 312,665, a manifest error hath happened, to the great damage of the said Defendant, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Court of Appeals for the District of Columbia, together with this writ, so that

you have the same in the said Court of Appeals, at Washington, within 20 days from the settling of the bill of exceptions, or within such additional time after the expiration of the 20 days as the court below or a judge thereof for sufficient cause shall allow; that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable George E. Martin, Chief Justice of the said Court of Appeals, the 28th day of October, in the year of our Lord one thousand nine hundred and thirty-five.

[Seal United States Court of Appeals for the District of Columbia.]

HENRY W. HODGES,
*Clerk of the United States Court of
Appeals for the District of Columbia.*

Allowed by:

HAROLD M. STEPHENS,
*Associate Justice of the United States Court
of Appeals for the District of Columbia.*

5 In the Municipal Court of the District of Columbia.

No. 312,665.

PENNSYLVANIA DRUG CO., INC., a Body Corporate, 13th & E
Sts., N. W., Plaintiff,

vs.

U. S. FIDELITY & GUARANTY Co., a Body Corporate, 1415 K
St., N. W., Defendant.

Bill of Exceptions.

Be it remembered that on the 10th day of October, 1935, the above-entitled cause came on for trial in the Municipal Court of the District of Columbia before Honorable Ellen K. Raedy, one of the justices of the said Court to try the issues between the plaintiff and the defendant.

Present on behalf of the plaintiff, Samuel R. Blanken, Esq.; on behalf of the defendant, J. Harry Welch, Esq., and Gerald I. Oxenburgh, Esq.

Whereupon, upon behalf of the plaintiff corporation, its manager, and one of its officers, **Mr. David Portner**, was sworn as a witness and testified on direct and cross examination that the plaintiff corporation had a place of business and was doing business in the District of Columbia in March, 1934; that on to-wit the first day of March, 1934, the plaintiff entered into a contract of insurance with the defendant corporation which was doing business in the District of Columbia, under the terms of which the defendant agreed for premium paid to indemnify the plaintiff in accordance with the terms thereof which were set out in the Bill of Particulars filed on behalf of the plaintiff corporation. He testified further that on the evening of July 11, 1934, as was his custom he placed in the safe behind the drug counter and in the back part of plaintiff's store, the receipts from the day's business, the same being in a small
6 cigar box which was in turn placed within the safe, which he locked in accordance with his custom.

He testified further that it was his custom to personally supervise the closing and locking of all windows and the locking of the store which he did on this occasion; he further testified that on the morning of the 12th day of July, that is, the succeeding morning, at about 10 to 10:30 o'clock he was in need of the money in the safe and went to the safe for the purpose of extracting the same therefrom; he testified that there was nothing unusual in the appearance of the safe and nothing to arouse his attention or suspicion nor to indicate that it had been touched or tampered with, until he proceeded to open the same. He turned the handle preparatory to turning the dial; the safe was unlocked and came open; he was much surprised at its being open and discovered that the cigar box in which the money was contained was empty. He then noticed some marks on the door of the safe and three or four dents on the dial and testified that these marks and dents were not on the safe the previous night; that he immediately notified the defendant company and the Police Department; that the safe had been purchased by him second-hand; that the safe had been repainted before he purchased it; he further testified that Detective Sergeant Murray of the Metropolitan Police force came to the store and made a thorough examination of the safe and the premises and interviewed several employees;

that the officer took finger prints on the safe, window, and of the employees; that the representative of the insurance company came to the store and that he directed the attention of the said representative to the safe and gave him all the information he had concerning the matter; that the insurance representative stayed there five to ten minutes and then departed. He testified as to original entries in a daybook and original entries in a ledger from which the amount of money in the box was shown to be Two Hundred Sixty-Four Dollars and Twenty-Three Cents, (\$264.23).

Detective Sergeant Murray of Thirty (30) years' experience with the Metropolitan Police force then testified on behalf of the plaintiff that he received a call to come to the plaintiff's establishment and arrived sometime about eleven o'clock on the 12th day of July, 1934; that he talked to the Manager of the establishment who brought him to the safe; that he inspected the safe; that he was not a safe expert; that there were some marks on the door; that there were three or four dents on the dial of the safe; that on the floor near the safe was a meat cleaver and also a hammer or hammer and hatchet combined which might have belonged to the kitchen of the food service conducted by the plaintiff; that he inspected the entire premises; that he found evidence on the balcony window leading to the fire escape that the window had been forced open; that there were finger prints thereon; that he took finger prints from the window and from the safe; that he interviewed several employees and at later times compared employees finger prints with the Police Department records but had located none that compared with those taken of the employees.

Plaintiff then rested.

Whereupon, defendant moved for a directed verdict upon the ground that the plaintiff had failed to carry the burden of proof; that the plaintiff had failed to show a violent entry into the safe; that the plaintiff had failed to show that an entry had been made by actual force and violence of which there were visible marks made by tools, explosives, etc., upon the exterior of the doors of the safe or on the top, bottom, or walls of the safe through which an entry had been made; that the plaintiff had failed to prove its allegations

which were only the contract and its specific provisions. The motion was overruled by the Court and exception noted.

8 The defendant, maintaining its issues, then presented upon its behalf, **Gerald I. Oxenburg**, who being duly sworn identified himself as a member of the Bar of the District of Columbia, and a practicing attorney who had made the original investigation on behalf of the defendant; on direct examination he stated he made the examination at that time because when the report came by telephone there was no one available in the office to make the investigation and he was requested to do so; that he went to the plaintiff's place of business at about 11:30 o'clock; that it was sometime just prior to the noon-time rush; that he talked to Mr. Gerber, one of the officers in the corporation and the manager, Mr. Portner; that one of these gentlemen took him to the safe; that he looked at the safe carefully; that there were some slight marks on it but there were no dents on the dial; that none were called to his attention; that one of the officers of the corporation (his recollection was that it was Mr. Gerber) took from his pocketbook a card bearing the safe combination, unlocked the safe which was locked at the time; that the dial and combination appeared to be in good working order; that he was asked by Mr. Portner, the manager, of the plaintiff's corporation, if in his opinion they were covered for the loss sustained by their insurance policy. In reply to the query he stated that in his opinion they were not, but someone at the office would have to decide; that there was some general discussion; that no marks on the dial were even discussed and that he looked at the dial and saw no marks thereon; that there were no tools, hammers, cleavers, or hatchets spoken of, seen, or in sight at any time during his entire discussion, and neither were they called to his attention by the slightest reference by any one at the plaintiff's place of business; that he was there for a period of from fifteen minutes to half an hour.

9 On cross-examination, Mr. Oxenburg testified that he made the investigation because it was lunch time and there was no one else present to do so; that he did not kneel down to examine the safe or the dial, but he stooped over slightly; that the safe was about three feet high; that the dial was about 18 inches from the floor and that he was

about five feet eleven inches tall; that he did not look in back of the safe nor at the sides of the safe; that he examined the doors but not the windows; that he did not recall exactly who he talked to but was advised that they were officers of the corporation.

Mr. William F. Blaydes, Jr., was then called as an expert witness for the defendant and after being duly sworn testified that he was employed by the York Safe & Lock Co., manufacturers of bank and safe vaults; that he had been in that business for a period of about fourteen years; that he repaired safes, serviced safes, now and then assisted in selling safes; was perfectly familiar with this type of safe because of his training and experience; that at many times repaired and adjusted such safes; that he made an examination of this safe at the request of the defendant on August 3, 1934; that the safe was an old safe; that there were no marks whatsoever on the door and dial; that the dial was working perfectly; that he locked it and unlocked it eight or ten times; in response to a question as to whether there appeared thereon (on the safe) any visible marks made by tools, explosives, etc., which had effected a violent entry therein, his answer was "no".

Defendant then rested.

Defendant renewed its motion for directed verdict which was overruled and objection taken.

Thereupon, the case was argued by counsel for both parties; thereupon, the Court ruled that "I find for the plaintiff in the sum of Two Hundred Fifty Dollars (\$250.00).

10 Thereafter, within the time prescribed by the rules of the Municipal Court of the District of Columbia, the defendant filed a motion for new trial which was properly served upon counsel for the plaintiff and upon hearing was overruled and appeal noted. Counsel for defendant advised the Court that a petition for Writ of Error would undoubtedly be filed.

Be it further remembered that the foregoing contains the substance of all of the evidence given at the hearing of this cause and the objections taken and the exceptions taken by counsel for both plaintiff and the defendant and then and there entered upon the minutes of the Justice presiding at the trial and counsel for the defendant prays the Court to

sign and seal this Bill of Exceptions now for then and the same is done this 23rd day of December, 1935.

ELLEN K. RAEDY,
Justice.

Agreed to:

SAMUEL R. BLANKEN,
Attorney for Plaintiff.
J. W. H.

J. HARRY WELCH AND
GERALD I. OXENBURG,
Attorneys for Defendant.

11 *Assignment of Errors.*

Comes now the defendant, U. S. Fidelity & Guaranty Co., a Corporation, and assigns for review on appeal, error committed by the trial Judge as follows:

- (1). The Court erred in finding for the plaintiff.
- (2). The Court erred in denying defendant's request for a directed verdict at the close of the plaintiff's case.
- (3). The Court erred in denying defendant's request for a directed verdict at the close of defendant's case.
- (4). The Court improperly applied the law to the facts in the light of the allegations in the pleading.
- (5). The Court erred in finding for the plaintiff and in entering judgment for the plaintiff.

(Signed) J. HARRY WELCH,
 GERALD I. OXENBURG,
 Attorneys for Defendant.

Copy of the foregoing received this 20th day of November, 1935.

(Signed) SAMUEL R. BLANKEN,
 Attorney for Plaintiff.

Designation of Record.

Filed December 18, 1935.

The Clerk will please include the following in the Record to be certified in the Court of Appeals:

1. The Bill of Particulars.
2. The Finding of Fact of October 10, 1935.

3. The Judgment of October 17, 1935.
4. The Writ of Error.
5. The Bill of Exceptions.
- 12 6. The Assignment of Errors.
7. This designation of record.

(Signed) J. HARRY WELCH,
“ GERALD I. OXENBURG,
Attorneys for Defendant.

Copy of the foregoing received this 17th day of December, 1935.

(Signed) SAMUEL R. BLANKEN,
Attorney for Plaintiff.

13 Municipal Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Blanche Neff, Clerk of the Municipal Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 12, both inclusive, to be a true and correct transcript of the record, according to direction of counsel herein filed, copy of which is made part of this transcript, in Cause, At Law, No. 312,665, wherein Pennsylvania Drug Co., Inc., a body corporate, is plaintiff, and U. S. Fidelity & Guaranty Co., a body corporate, is defendant, as the same that remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 15th day of January, 1936.

[Seal Municipal Court of the District of Columbia.]

BLANCHE NEFF,
Clerk.

Endorsed on cover: In error to the Municipal Court. No. 6627. U. S. Fidelity & Guaranty Co., a body Corporate, Plaintiff in error, vs. Pennsylvania Drug Company, Inc., a body corporate. United States Court of Appeals for the District of Columbia. Filed Jan. 16, 1936. Henry W. Hodges, Clerk.

